Circuit Court of the United States for the District of Iowa.
January Term 1863.

THE UNITED STATES *ex rel.* LEARNED *vs.* THE MAYOR AND COUNCIL OF THE CITY OF BURLINGTON.

The Federal Courts have jurisdiction and power to issue the writ of *mandamus* to a municipal corporation to compel it to perform its duty, although such duty is created and enjoined by state law alone.

An agreement to levy a *special tax* cannot be implied from an ordinance making it the duty of the City Council "to provide means to meet the payment" of a designated debt when the same may become due.

A City Council has no power to levy taxes not expressly authorized by its charter or the law. Hence, where by the charter of a city it is provided that no greater tax than one per centum shall be levied for any one year, and this maximum rate is actually levied, a mandamus will be refused even to a judgment-creditor to compel the city to levy a greater tax, or even to levy a *specific* tax to pay his judgment.

MILLER, J.—The plaintiff having recovered against the City of Burlington a judgment in the District Court of the United States for the State of Iowa, and having issued execution which was returned *nulla bona*, applied to that Court for a writ of *mandamus*, requiring the Mayor and Aldermen of said city to levy a special tax for the payment of said judgment. The cause being of that class which, by the act creating this Court, is transferred into it, the application is now made here for the peremptory writ.

The defendants, who have been served with notice, make answer under oath to the information, and set up, substantially, the following reasons why the writ should not be granted:

1st. That the Courts of the Federal Government have no jurisdiction to issue a writ of *mandamus* to persons whose functions are created by state law, such officers being responsible alone to state authority, so far as this writ is concerned.

2d. That there is nothing in the ordinance or contract, by which the debt was created, which requires that any specific tax shall be levied for the payment of this debt.

3d. That by the charter of the city of Burlington, no greater tax than one per cent. per annum can be levied on the taxable property of the city, and that the authorities have levied a tax of that amount for the present year.

The plaintiff objects, by way of demurrer, to the sufficiency of the matters thus set up in the answer, which may be treated as standing in the place of a return to an alternative writ.

1. If there were any doubt as to the power of the Federal Courts to use the writ of *mandamus* in cases of this character, the question is settled in favor of the existence of that power by the case of *The Commissioners of Knox County* vs. *Aspinwall*, 24 Howard S. C. R. 376. The first objection is therefore untenable.

2. In reply to the second objection it is claimed by plaintiff that in the ordinance for borrowing the money, under which the debt was contracted, on which the judgment was rendered, there *is* a provision for levying a specific tax for the payment of the debt and interest.

The language of the ordinance on this subject is as follows:—

"Be it further enacted, that it shall be the duty of the City Council of said city to provide means to meet the payment of said bonds and coupons, when the same may become due, according to the contract entered into for said loan and to pay the same.'

Does this language imply an agreement to levy a *special tax* separate from other taxes or other resources of the city, for the payment of this debt? Or does it imply that out of the various resources of the city, its general annual tax, its wharfage, its licenses, or its power to borrow money, *some* means will be provided by the city authorities for that purpose? The latter seems to be the more reasonable construction of the ordinance.

The plaintiff, however, urges that by sections 1895, 1896, 1897 of the Code, Revision of 1860, § 3274 *et seq.*, it is made the duty of the Mayor and Aldermen of the city to levy a tax for the special purpose of paying this debt, and to see that it is collected and appropriated to that purpose, and that this duty should be enforced by *mandamus*. These sections do provide that in cases where judgment has been recovered against a city or any other civil corporation, and no property is found on which to levy execution, that "a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs."[1]

[1] These sections of the statute law are as follows:

Section 3274 (1895). "Public buildings owned by the state, or any county,

The case of *The State at the relation of Brackett* vs. *The County Judge of Floyd County*, 5 Iowa R. 380, seems to intimate pretty strongly that in such a case if the tax was not levied, a sufficient remedy is provided by section 1897 in the personal responsibility of the officers who should refuse to make the levy. From the view taken of the present case by the Court, it is not necessary to decide this point.

3. If it is true, as claimed by defendant, that the Mayor and Aldermen of Burlington have no legal authority to levy *any* tax on property liable to taxation, exceeding one per cent. per annum, and that they have levied a tax of that amount for the present year, it is clear that this Court cannot compel them to levy any additional tax.

The only statutory provisions on that point, brought to the attention of the Court, or which it has been able to find, are the 1st section of the Act of February 22d, 1847, to amend the charter of the city of Burlington, and the 1st section of the Act of January 22d, 1853, to amend said charter.

By the act first mentioned, it is declared "that the amount of tax to be levied upon real and personal estate by the Mayor and Aldermen of the city of Burlington, after the taking effect of this act, shall not exceed 12½ cents on every one hundred dollars' worth of property to be assessed." This is one-eighth of one per cent.

The Act of 1853 says, "That to defray the *current expenses* of

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city, school district, or other civil corporation, or any other public property necessary and proper for carrying out the general purpose of the corporation, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation."

Section 3275 (1896). "In case no property is found on which to levy, which is not exempted by the last section, or if the judgment-creditor elect not to issue execution against such corporation, he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. *And if the debtor corporation issues no scrip or evidence of debt, a tax must be levied as early as possible.*"

Section 3276 (1897). "A failure on the part of officers of the corporation to comply with the requirement of the last section, renders them personally liable for the debt."

said city, the City Council shall have power to levy and collect taxes on all the real and personal property in said city, not exempted by general law from taxation: *Provided*, That the amount of taxes levied for said purpose shall not in any one year exceed one dollar on each one hundred dollars' worth of property taxed."

The result of these two sections considered alone would seem to be that except for the purpose of defraying the current expenses of the city, the tax cannot exceed one-eighth of one per cent., and cannot, for any or all purposes, exceed one per cent.

Do the provisions of §§ 1895, 1896, and 1897 of the Code repeal the above sections of the city charter, or do they override them when brought into question together, or is there any necessary conflict between them? There is certainly no express repeal, and the Code could not be intended by implication to repeal the section last quoted, for it was passed since the Code became the law of the land. The rule also is well understood, that a repeal by implication can only arise when that is the necessary inference from the impossibility that both the acts, supposed to be in conflict, can stand. If either act is to override the other, or repeal the other, certainly the later expression of the legislative will must stand in preference to the former. But in the present case, there is no such necessary conflict. The provision of the Code can have its effect by compelling the City Council to levy the tax *so far as it has power to levy it.* The provisions of the charter can stand as they were intended, as a useful and just limitation of that power. The previous year to this the City Council of Burlington, as appears by the answer in this case, only levied a tax of one-half per cent.

Undoubtedly if this was found to be inadequate to meet the current expenses, and to provide a fund to meet the judgment, it was the duty of the council under § 1897 of the Code, to so increase the tax, *inside of one per cent.*, as to raise that fund if it could be so done.

This they aver they have now done to the full extent of their authority, and this Court will not order them to exceed it.

That this is a sound view of the intention of the framers of the Code is strongly to be inferred, from some of its provisions on the

subject of town and city corporations. Chapter 42 is devoted to providing the manner in which the citizens of a village or town may organize themselves into a corporation, and may either assume the privileges and responsibilities of towns or cities according to the number of the population. In speaking of a town charter thus adopted, it says, § 665, that it may give powers to establish by-laws, ordinances, &c., and "to levy and collect taxes on all property within the limits of such corporation which by the laws of the State is not for all purposes exempt from taxation, which tax must not exceed one per cent. per annum on the assessed value thereof," and § 669 says that "the preceding provisions are applicable to a town desiring to become organized as a city." Now these are the very corporations mentioned in §§ 1895 to 1897 inclusive, of which it is said that a tax must be levied to pay a judgment recovered against them. Was it meant that they should absolutely, at once, levy a tax sufficient to pay the debt without regard to the one per cent. limitation in the previous sections? Or was it meant that they should use such taxing power as they had for that purpose, and no more? If the former is the sound construction, then the limit upon the taxing power is nugatory, and it makes no difference how strongly the legislature, or the charter adopted by the people, may forbid excessive taxation, the authorities of the city may, by resorting to the power to make contracts, impose upon the property-holders a tax unlimited in amount or duration. The wisdom of that provision in the Code, and in the charter of the city of Burlington, has been amply vindicated by events occurring since their enactment, and they should not be lightly set aside.

As it appears then to the Court, that the city authorities have already levied for the present year, a tax as large as the law permits, no writ of *mandamus* can rightfully issue to compel them to levy more.

The demurrer of plaintiff being to the whole answer, is overruled, and the application for a writ of *mandamus* is refused.

The importance of the questions discussed and decided by Mr. Justice MILLER in the foregoing opinion, will more fully appear when it is considered that

the charters of most of the western, if not eastern cities, contain limitations on the power of taxation similar to those contained in the charter of the city of Burlington, and when it is further considered that many of these cities, in the flush and prosperous times preceding 1857, contracted heavy debts by way of subscriptions to the stock of railway companies, for internal improvements, and for other purposes. Its practical importance, therefore, as well as the high position and ability of the Judge who delivered the opinion, well justifies its publication.

The case is suggestive of a few thoughts which we will briefly present. We have given in a note the sections of the Code to which the opinion refers, in order that the reader might have a clear view of all the statute law bearing on the subject.

I. The first remark we make is, that there is nothing in the opinion which favors the idea that cities will be allowed to evade the performance of their *legal* obligations to their creditors. If the organic law of a municipal corporation contains *no* limitation on the rate of taxation, there is nothing in the judgment under consideration which denies the right of a judgment-creditor to a *specific* or other *sufficient tax* immediately to pay his debt. In the absence of such limitation on the taxing power, then, if the creditor has been prudent enough to stipulate for the levy of a specific tax, it cannot be doubted that his rights would, if necessary, be enforced against the delinquent tribunal or debtor by *mandamus*. And where, as in the principal case, there is a limitation, it is very plainly intimated, and doubtless would have been so decided if the case had called for it, that the debtor corporation would, if necessary to pay the judgment, be compelled to levy the maximum rate authorized by its charter. These observations may be extended to and applied, *mutatis mutandis*, to counties and other civil corporations.

II. In regard to the decision of the main point involved, no reason is seen to question its correctness. The creditor had not stipulated for the levy of a *special tax* to pay his debt. The charter of the city contained, at the time the debt was created, an express provision, "the wisdom of which," according to Mr. Justice MILLER, "has been amply vindicated" by experience, limiting the taxing power. The object of this provision is obvious—to secure the citizen and property-owner against onerous and excessive taxation. The sections of the Code of Iowa relied on by the relator were held by the Court, and we think correctly, not to confer the right upon the city to levy taxes to an amount greater than the charter-rate. These sections occur in the general statutes of the State in the chapter on "Executions." They do not confer upon the city a *distinct, substantive, grant of the power of taxation;* but can have effect by compelling the city to levy, *in accordance with its charter* and *as far* as it has the power to do so, a tax to pay the debt.

The case before the Court, then, was one where the charter of the city prohibited a rate of taxation for any one year to "exceed one dollar on each one hundred dollars' worth of property taxed." That amount the city had actually levied. The Court held that more could not be legally required of it. The legal principles upon which this portion of the decision rests seem to the writer to be plain. No lawyer will question the correctness of the proposition that neither a city nor any other civil body can exercise the right or power of taxation unless such power or right be expressly conferred by the Legislature. Recognising this well-known principle,

it is said in a very recent case (12 Iowa 545), "that no property can lawfully be taxed until the Legislature authorizes it to be done, and when the act requires it to be done in a particular way, that way alone can be pursued." It follows that if the Legislature has conferred no power of this kind, the city or other political body can exercise none. If such power is delegated to a limited extent, it can be exercised to that extent, but no further. It seems, also, necessarily to follow, that the power to create a liability does not *per se* imply or carry with it the power to levy and collect a tax to discharge such liability. The grant of power to levy and collect taxes must be clear, distinct, and express. In the charter of the city of Burlington the same grant which gave the power contained also the limitations upon the extent to which it might be exercised.

The precise question decided in the foregoing case has not, to the writer's knowledge, at least as respects cities, been elsewhere adjudicated. It was raised in the case of The Commonwealth ex rel. Hamilton *vs.* The Council of the City of Pittsburgh, 34 Pa. St. Rep. 496. By the Act of 1804, incorporating the town of Pittsburgh, the levy of a tax in any one year exceeding half a cent on the dollar was prohibited except upon certain conditions, which had not been complied with. But the Court held that as the special Act of 1853, which authorized the city to subscribe the stock, also authorized it to borrow money and to provide funds for its payment by the levy and collection of such taxes as might be necessary, that this amounted to a repeal *pro tanto* of any prior statutory restrictions (if any there were) upon the exercise of the right of taxation.

But the principle involved in the leading case is everywhere admitted. Thus, in the Elementary Treatise on the subject the law is thus stated and the authorities cited:—"The power to levy the tax is a limited one, and if the limits prescribed by the law are transcended, the levy is void." Blackwell on Tax Titles 190. "The power of taxation is the highest attribute of sovereignty. It cannot be enforced against the citizen unless it is clearly and distinctly authorized by law." Id. 194. "A municipal corporation or other inferior organization possesses no power to levy taxes not expressly authorized by its act of incorporation. Where they are thus authorized they must, in the exercise of the power, conform to the principles and requirements of the constitution." Id. 196, 197. "The exercise of the power to levy taxes by the fiscal agents or officers of a county, city, town, &c., is not a judicial, but a ministerial act, and is discretionary *within the limits prescribed by law.*" Id. 196.

In the case of Kemper *vs.* McClelland's Lessee, 19 Ohio 308—a case in many respects strikingly like the one under review—these general principles were applied. A law of Ohio provided that taxes to be levied for *county purposes* should not "exceed *three* mills on the dollar." The commissioners, notwithstanding, imposed a tax of *four and a half* mills, and the Court held that the levy and all tax sales made to pay the same were unauthorized and void.

III. Other questions might be suggested, but cannot be discussed at this time. Can the Legislature, for example, as against an existing creditor by an amendment to the law reduce the limit or abridge the power of taxation?

Again:—On the answer of the City, in the principal case, that it had levied a *general* tax as large as the law permitted, the Court denied a *mandamus* to compel the levy of a *special* tax. On the general tax the judgment-creditor would have no lien. And as officers of municipal corporations are generally held not

subject to garnishment, the creditor could acquire no lien on the proceeds of such general tax. Suppose the City, when the tax was collected, should refuse to pay the judgment-creditor, could not the Courts compel it to do so by *mandamus* or other appropriate remedy? Suppose the City should act in bad faith and misappropriate the tax, could not the Courts, by injunction or otherwise, protect the creditor and compel the City to do right? But suppose the City, without acting in positive bad faith, should need or appropriate all the general tax in carrying on the legitimate functions of the corporation, such as paying officers, repairing streets, &c., &c., can it be restrained from so doing by a judgment-creditor? Has a judgment-creditor, under such circumstances, the right to be paid and to insist, if necessary, that the officers of a city, or at least that those who extend credit to it afterwards, shall take the scrip or credit of the city, and in their turn obtain judgment and payment? Has a judgment-creditor any greater rights than a non-judgment creditor? If so, are judgments to be paid in the order of their date? These and similar queries of a like practical character may be started, to many of which it would be difficult to find answers in cases already adjudged. They open to an inviting field, on the confines of which even, we cannot enter at this time. We propose to give the results of our explorations of it on a future occasion, if not anticipated by others. J. F. D.

DAVENPORT, Iowa.

Supreme Court of Maine.

SUMNER A. PATTEN *vs.* ANDREW WIGGIN.

Physicians and surgeons who offer themselves to the public as practitioners, impliedly promise thereby, that they possess the requisite knowledge and skill to enable them to treat such cases as they undertake with reasonable success.

This rule does not require the possession of the highest, or even the average, skill, knowledge, or experience, but only such as will enable them to treat the case understandingly and safely.

The law also implies that in the treatment of all cases which they undertake, they will exercise reasonable and ordinary care and diligence.

They are also bound always to use their best skill and judgment in determining the nature of the malady and the best mode of treatment, and in all respects to do their best to secure a perfect restoration of their patients to health and soundness.

But physicians and surgeons do not impliedly warrant the recovery of their patients, and are not liable on account of any failure in that respect, unless through some default of their own duty, as already defined.

If the settled practice and law of the profession allows of but one course of treatment in the case, then any departure from such course might properly be regarded as the result of want of knowledge, skill, experience, or attention.

If there are different schools of practice, all that any physician or surgeon under-

takes is, that he understands, and will faithfully treat the case according to the recognised law and rules of *his* particular school.

Action, assumpsit on account annexed. One portion of the account is for professional services as a physician, in attendance on defendant's minor son.

The defence to this portion of the claim was malpractice in the treatment of the patient, and such ignorance, want of skill and judgment on the part of the plaintiff in managing professionally the case under his care, that the patient was more injured than benefited by his treatment, and that on the whole case he was not reasonably entitled to recover anything for his services.

Evidence was introduced on both sides as to such treatment and management by the plaintiff, during the whole time the patient was under his care.

The Court (Judge KENT) instructed the jury that if the plaintiff had been guilty of malpractice, or neglect, or want of ordinary care and skill, within the rules hereafter stated, it would be a defence to that part of the claim which related to the treatment of plaintiff's son,—the Court instructed the jury as follows:—

1. When a man offers himself to the public or to patients as a physician or surgeon, the law requires that he be possessed of that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession who are in good standing as to qualifications, and which reasonably qualify him to undertake the care of patients.

This rule does not require that he should have the highest skill, or largest experience, or most thorough education, equal to the most eminent of the profession in the whole country; but it does require that he should not, when uneducated, ignorant, and unfitted, palm himself off as a professional man, well qualified, and go on blindly and recklessly to administer medicines, or perform surgical operations. The rule above stated is the true one.

But a physician qualified within this rule may be guilty of negligence or malpractice.

2. The law requires, and implies, as part of the contract, that when a physician undertakes professional charge of a patient,

he will use reasonable and ordinary care and diligence in the treatment of the case.

3. The law further implies, that he agrees to use his best skill and judgment, at all times, in deciding upon the nature of the disease, and the best mode of treatment, and the management generally of the patient. The essence of the contract is, that he is to do his best—to yield to the use and service of his patient his best knowledge, skill, and judgment, with faithful attention by day and night as reasonably required. But there are some things that the law does not imply or require. He is not responsible for want of success in his treatment, unless it is proved to result from want of ordinary care, or ordinary skill and judgment. He is not a warranter of a cure, unless he makes a special contract to that effect. If he is shown to possess the qualifications stated in the first proposition, to authorize and justify him in offering his services as a physician, then if he exercises his best skill and judgment, with care and careful observation of the case, he is not responsible for an honest mistake of the nature of the disease, or as to the best mode of treatment, when there was reasonable ground for doubt or uncertainty.

If the case is such that no physician of ordinary knowledge or skill would doubt or hesitate, and but one course of treatment would by such professional men be suggested, then any other course of treatment might be evidence of a want of ordinary knowledge or skill, or care and attention, or exercise of his best judgment, and a physician might be held liable, however high his former reputation. If there are distinct and differing schools of practice, as Allopathic or Old School, Homœopathic, Thompsonian, Hydropathic, or Water Cure, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that both parties so understand it. The jury are not to judge by determining which school, in their own view, is best. Apply these rules to the evidence.

Then, as to medical and surgical treatment of the case,—was there, or was there not, a want of ordinary skill and judgment,

such as to render the plaintiff liable within the above rules—such evidence as satisfies you that he either did not possess the education, judgment, and skill which authorized him to undertake the case and enabled him to treat it with ordinary skill, or that he was guilty of that neglect or carelessness in the treatment or investigation of the case which showed that he did not faithfully and honestly apply his skill, and knowledge, and best judgment.

Defendant requested the Court to give the following instruction:—

A physician who, upon request and in consideration of being paid for his services, takes charge of the case of a diseased person, warrants that he possesses and promises to exercise the knowledge, skill, and care requisite to enable him to understand the nature of his disease, and to treat it properly, but the degree of such knowledge, skill, and care is not that which is possessed and exercised by physicians of the highest knowledge, skill, and care, but it is that possessed by physicians of ordinary knowledge, skill, and care.

The Judge declined to give this, except as given in former instructions.

The Judge, in his charge, also instructed the jury, that in cases where authorities differ, or "doctors disagree," the competent physician is only bound to exercise his best judgment in determining which course is, on the whole, best.

Verdict for plaintiff for the amount of his bill, to which rulings and refusal the defendant excepted.

The case on the exceptions was argued before the Law Court at the May Term, 1862, and the rulings of the Judge at the trial were sustained, and the exceptions overruled.

C. A. Everett and *J. H. Rice*, for plaintiff.

A. Sanborn, for defendant.

We publish the foregoing case because it covers the entire ground of the very interesting subject. The history of the legal responsibility of medical practitioners and surgeons, for malpractice, is curious. Physicians are regarded as a higher rank in the profession than surgeons, and are not allowed by the English common law to recover pay for their services, or even for medicines furnished by them; their fee being regarded as merely an honorary gratuity, the same

as in the case of a counsellor at law. But surgeons and apothecaries have always been allowed to maintain actions to recover compensation for their services, the same as the subordinate ranks of the profession of the law. And in this country no distinction has been made between physicians and surgeons. Both are allowed to maintain actions for their services, and both are liable to actions for malpractice. And in the recent English case of Attorney-General *vs.* The Royal College of Physicians, 7 Jur. N. S. 511, it was held that physicians might recover for their services on a special contract.

These actions have been not uncommon in the case of surgeons for a great number of years, both in England and America. Surgery is there regarded much in the nature of a mechanical trade, and a similar degree of responsibility is attached to the practice of it. It was originally confined almost exclusively to the barbers, in London and throughout Great Britain. But the great amount of learning and skill required in the practice of surgery has rendered it a highly respectable and liberal profession throughout the world, ranking, in many respects, even higher than the practice of medicine. But the laws of that profession are far more clearly defined, and the consequences of departure from them much more fully understood, than in that of medicine; so that actions are more likely to be brought, for such departures from the law of the profession, in surgery than in medicine, since, being better defined, they are consequently more susceptible of proof.

The rule of law applicable to this class of actions is commonly expressed in much the same terms which we apply to any other pecuniary responsibility. It is, that one who allows himself to be employed, in any department of the profession, impliedly undertakes that he possesses such degree of learning, experience, and skill as renders it safe and proper for him to undertake that particular business, and that he will exercise these faculties in a careful and faithful manner. This is the rule laid down in the principal case, and is sustained by numerous reported cases. Landon *vs.* Humphrey, 9 Conn. R. 209; Howard *vs.* Grover, 28 Maine R. 97; Wood *vs.* Clapp, 4 Sneed 65. But a rule of law laid down in such general terms is not much aid to a jury, or much guide to any one, in determining such questions as arise upon this subject.

1. It may be assumed that there is some definite rule, or some well-understood course, for the management of cases, both in medicine and surgery. This rule is the law of the medical profession for that case. There may be cases where different rules obtain and are sanctioned by allowable authority. In such cases there is a discretion allowed the practitioner. But every case of this kind must be tried by the *law* of the *medical profession*, and this law is the law of the case, and it must be established by witnesses of skill and experience in that profession. BLACK, C. J., in McCandless *vs.* McWha, 22 Penn. St. R. 261, 274.

2. When the *law*, or *laws*, of the *medical profession* have been once established, in any particular case, to the satisfaction of the triers, it will be safe to affirm, that every practitioner who allows himself to be employed in that particular case, impliedly assumed and promised to his employer, that he knew the approved or allowable rules or laws of the profession applicable to that case, and that he would practise them with reasonable care, skill, and diligence. It is not important whether these laws,

obtaining in the profession at any given period, are wise or foolish, reasonable or unreasonable, any more than it is in regard to the law of the land. If it *be the law*, it *must* be followed. And to this end, all that is requisite is that it be the settled, generally received, or at least, allowable, practice of the profession, *at that time.*

3. Questions often arise in regard to the extent of the discretion of the practitioner in the treatment of cases. Where the course of practice in the profession is uniform and entirely settled, any one who departs from it must do so at his peril. And if any bad results follow in consequence to the patient, the medical man is responsible, not only for all pecuniary damages, but even to criminal prosecution in certain cases. Slater *vs.* Baker, 2 Wilson 359. And it is no excuse that the practitioner is very skilful and experienced, and that he departed from the general course of practice in his profession, with an honest expectation of benefiting his patient. In the case last cited, the defendant had been for twenty years the first surgeon in St. Bartholomew's Hospital, London. The Court nevertheless held him responsible in damages for the unfortunate and unforeseen consequences to his patient, saying, That if this was the first experiment of the kind, it was rash, "and he who acts rashly acts ignorantly," "and although the defendant, in general, may be as skilful as any gentleman in England," in his profession, yet, in this particular case. he acted ignorantly, rashly, and unskilfully, "contrary to the known rule and usage of surgery." The same principle is maintained in Speare *vs.* Prentice, 8 East 348, and in Lamphier *vs.* Phips, 8 C. & P. 475, where TINDAL, C. J. (C. P.), gives a very clear and satisfactory exposition of the duty of surgeons and physicians. And a surgeon, or physician, may become responsible for the mistake or neglect of his apprentice while acting on his behalf. Heineke *vs.* Hooper, 7 C. & P. 81.

4. One who acts in the capacity of surgeon or physician, as expressed by BAYLEY, B., in Rex *vs.* Long, 4 C. & P. 423, 440, and "has acted with *gross and improper rashness and want of caution*," and the life of the patient is thereby sacrificed, will be liable to punishment criminally. There is also a case of considerable interest, Commonwealth *vs.* Thompson, 6 Mass. R. 134, where the founder of the Thompsonian practice, consisting in the use of vegetable stimulants, who destroyed the life of one of his patients by the too free use of lobelia, in repeated doses, was indicted for wilful murder. The accused was tried before Chief Justice PARSONS and a full Court, and defended by the late Mr. Justice STORY, then at the bar. The case presented the most deplorable ignorance in the respondent, and a degree of foolhardy presumption and dogged perseverance, which certainly should have exposed him to a conviction for manslaughter. But the law was laid down so favorably to the right of the people to be cured, or killed, in their own way, that the trial resulted in an acquittal. And the rule of the English law has been laid down very favorably to the accused in such cases. In Rex *vs.* Martin, 2 Carrington & Payne 625, in a trial at the Old Bailey, before three Judges, it was decided, That if a person, *bona fide* and honestly exercising his best skill to cure a patient, perform an operation, which causes the patient's death, he is not guilty of manslaughter, and it makes no difference whether such person be a regular surgeon or not; nor whether he has had a regular medical education or not. But the rule in most of the English cases

upon this subject is, that where an ignorant man, without any necessity, voluntarily undertakes delicate and difficult operations in surgery, and is therein guilty of gross ignorance or reckless disregard of life, and death ensues, he is guilty of manslaughter. Rex *vs.* Long, 4 C. & P. 398. Rex *vs.* Stimpson, in note to the last case; where Mr. Justice BAYLEY said, "If a person not of medical education, where professional aid might be obtained, undertakes to administer medicine which might have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter."

5. The cases in this country where the responsibility of the medical profession has been brought in question, have been mostly civil actions. And it does not seem that the medical man is in general responsible for mere mistakes or errors in judgment. McLallen *vs.* Adams, 19 Pick. 333, where the employer attempted to defend against the surgeon's action for his bill of fees, and it was held that where the wife of the defendant was afflicted with a dangerous disease, and was carried by him a distance from home and left under the care of the plaintiff as surgeon, and after the lapse of some weeks the plaintiff performed an operation for her cure, soon after which she died; that the performance of the operation was within the scope of the plaintiff's authority, if in his judgment it was necessary or expedient, and that he was not bound to prove that it was necessary under the circumstances. It has sometimes been considered that the case of Howard *vs.* Grover, 28 Maine 97, made the surgeon responsible for the consequences of an error in judgment in amputating a limb so far from the body as not to remove all of the diseased bone. But if that was intended to be there decided, the case is not maintainable either upon principle or authority. But we do understand that case as having gone that length, precisely. It is there expressly said that the defendant is not liable for want of the highest degree of skill, and a distinction is adverted to between the degree of skill to be expected from country practitioners and those who have the advantage of extensive city hospital practice.

6. A professional man is as much bound to keep pace with the advance of knowledge in his department, as he is to study its laws, originally. McCandless *vs.* McWha, 22 Penn. St. R. 261. But he is not an insurer of the recovery and final perfect restoration of his patients, either in medicine or surgery. Since the cure of a broken limb, even if so fractured as ordinarily to result in a perfect cure, is liable to many contingencies which do not attend mere dead mechanism. McCandless *vs.* McWha, *supra.* But in the trial of an action to recover the amount of a dentist's bill, Chief Justice SHEPLEY charged the jury, "that if the plaintiff exercised all the knowledge and skill to which the art had at the time advanced, that would be all that would be required of him;" but the full bench regarded this as too high a standard of professional duty, and ordered a new trial. Simonds *vs.* Henry, 39 Maine 155.

7. Nor is any man in any profession bound to exercise the highest degree of skill and science. The character of these attainments in different persons in all professions and pursuits is of almost infinite variety in amount and degree of perfectness. The extent of one's practice very soon makes the greatest possible difference in the fees demanded by him for difficult operations, and also in his skill, resulting from that dexterity which can only be acquired by such enlarged practice. So that the mere novice, who is known not to have

had any experience in his profession, by no means undertakes for the same degree of skill, with the practitioner of half a century. So also the country practitioner in a remote provincial town cannot be said to owe the same degree of skill to his patients as he who has had the advantages of constant and extensive city and hospital practice. The most which inexperienced practitioners owe, either to themselves or their patients, is, not to be persuaded to undertake matters in their profession of such difficulty as to be beyond their knowledge and experience. It is perhaps here that medical men are most liable to fail in the performance of duty. Wood *vs.* Clapp, 4 Sneed 65.

8. The case of Piper *vs.* Menifee, 12 B. Monr. 465, presents rather a curious question in regard to the responsibility of the medical profession. The plaintiff who sued for his fees had, during his attendance upon the defendant, also attended patients infected by small-pox, and by the want of proper care had communicated the infection to the defendant and his family, whereby the plaintiff's bill for attendance was greatly increased, for which defendant claimed a deduction. The Court held that the plaintiff could not recover for the additional services rendered necessary by his own want of proper care, and that the defendant was entitled to a further deduction from that portion of the bill which was properly chargeable, sufficient to reimburse him for all damages which he had sustained by bodily suffering and loss of time.

9. The law presumes that physicians and surgeons perform their duty unless the contrary be shown, as in other cases where misconduct is charged. Bellinger *vs.* Craigue, 31 Barb. Sup. Ct. R. 534.

It may be of interest to the profession to know that Mr. Elwell, of New York, has within the last few years published a book upon this subject, which, as a first attempt in this department of the law, is not obnoxious to criticism, and will be found very useful to those who may have occasion to prepare causes for trial involving questions of this kind.

We have said nothing in regard to the degree of care and diligence required in the practice of medicine and surgery, because it is well understood in the profession, and there is no conflict in regard to the rule. It is such as a careful and trustworthy man would be expected to exercise in a case of equal importance. Different cases require very different degrees of watchfulness and attention. This is required to be in proportion to the importance and difficulty of the case. The cases bearing on the general question of care and diligence are collected and digested in Briggs *vs.* Taylor, 28 Vt. R. 180. I. F. R.

In the Court of Common Pleas of Philadelphia.

IN THE MATTER OF THE PETITION OF WILLIAM C. STEVENSON, CONTESTING THE ELECTION OF ALBERT LAWRENCE, AS CLERK OF THE ORPHANS' COURT.

A statute directing a Court to hear and determine a case "at the next term," does not prohibit such Court from proceeding to determine it after the expiration of the term, if the words of the statute are affirmative only. Such a statute is merely directory, and negative words are necessary to oust the jurisdiction of the Court when it has once attached.

This was a case of contested election for the office of Clerk of the Orphans' Court of the County of Philadelphia, and arose under an Act of July 2d 1839, sect. 5, relating to the election of prothonotaries and clerks, which provided as follows:

"The returns of the elections, under this Act, shall be subject to the inquiry, determination, and judgment of the Court of Common Pleas of the proper county, upon complaint in writing of thirty or more of the qualified electors of the proper county of undue election or return of any such officer, two of whom shall take and subscribe an oath or affirmation, that the facts set forth in such complaint are true, to the best of their knowledge and belief; and the said court shall, in judging concerning such election, proceed upon the merits thereof, and shall determine, finally, concerning the same, according to the laws of this commonwealth; and the prothonotary of the said court shall, immediately, certify to the governor, the decree of the said court on such election, and in whose favor such contested election shall be terminated, and the governor shall then issue the commission to such person in whose favor such contested election has determined; and the said court shall hear and determine such contested election, at the next term after the election shall have been held, and such complaint shall not be valid or regarded by the court, unless the same shall have been filed in the prothonotary's office within ten days after the election; and, in case such complaint is filed within the time above mentioned, it shall be the duty of the prothonotary to transmit by mail, imme-

diately, to the governor, a certified copy thereof, and in such case, no commission shall be issued until the court shall have determined and adjudged on such complaint as aforesaid."

The petition was filed November 22d 1861, and the next term of the Court commenced on the first Monday of December following, and expired on the 2d of March 1862. The cause had been on trial for a considerable time, and it was impossible, owing to the great number of witnesses, and the intricate nature of the case, to finish it before March 2d 1862, when the December term expired. On March 5th 1862, motions were made on behalf of the respondent: 1st. That the case be no further proceeded with. 2d. That the complaint be dismissed, on the ground that the time prescribed by the statute for hearing and disposing of the same has elapsed.

These motions were argued the same day by counsel, and an oral opinion given by THOMPSON, P. J., that the Court was bound to go on, and "finally decide" the case, and that the motions be refused. LUDLOW, J., was of opinion that the power of the Court over the case had ceased by limitation of law, and that the petition should be dismissed. A further difference of opinion arose as to what entry should be made on the record, where the Court was equally divided in opinion upon a question of jurisdiction. Subsequently, the whole matter was re-argued before a full bench.

L. C. Cassidy and *W. L. Hirst*, for respondent.—The Act directing the cause to be determined at the next term must be held to be imperative, and to prohibit any decision of the case after the expiration of that term. The legislature has said the complaint shall be filed within a certain time, and the case shall be finished within a certain time. After the expiration of the term, the power of the Court over the case ceases, and the complainants are out of court. *Carpenter's Case*, 2 Harris 486; *Bingham* vs. *Cabot*, 3 Dallas 19. The law requires that the case "shall be heard and determined at the next term," and this is equivalent to saying that it shall not be heard *after* the next term. Where the judges divide on a question of jurisdiction, the case cannot go on.

G. M. Conarroe and *F. Carroll Brewster*, for complainants.—The Act of Assembly is merely directory as to the time in which the case shall be decided. The Court is not prohibited from hearing the cause after the term, if it has been commenced in proper time. No negative words are used, and such words are necessary to make a statute prohibitory in such a case as this. A statute directing a public officer to do a certain thing within a certain time is directory only, unless he is restrained from doing it after that time: *Rex* vs. *Sparrow*, 2 Str. 1123; *Rex* vs. *Loxdale*, 1 Burr. 447; *Pond* vs. *Negus*, 3 Mass. 230; *People* vs. *Allen*, 6 Wend. 486; *People* vs. *Cook*, 14 Barb. 290; *Walker* vs. *Chapman*, 22 Ala. 126; *Ryan* vs. *Valandigham*, 7 Ind. 416; *Rex* vs. *Justices of Leicester*, 7 B. & C. 13. The petition must be filed within a certain time, because the legislature has said that if not so filed it shall "not be valid or regarded by the Court." No such words are used in reference to the time in which the case shall be decided. It is simply to be determined "at the next term." The Court is asked to insert by implication the words "and not after." This cannot be done. The legislature only meant the case to be heard and decided with all convenient speed. They did not expect the Court to perform physical impossibilities: *Covanhovan* vs. *Hart*, 9 Harris 502. Under the certiorari law (Purd. 316), cases are required to be decided "at the term to which they are returnable," yet it is not an uncommon practice for the Court to decide them after the term. The jurisdiction is *exclusive*, and the case must be decided by this Court or not at all: *Carpenter's Case*, 2 Harris 486. The jurisdiction of the Court having attached, it cannot be divested by delay in rendering judgment. The construction put upon the Act by the respondent, would lead to the most absurd results, viz.: that the case can never be decided; that the Governor can issue no commission; and that a large body of voters are to be disfranchised. The Court having been divided upon the motion it falls, and the proper entry on the record should be "motion overruled."

The opinion of the Court was delivered by

ALLISON, J.—When the case was last before the Court it was

upon a motion to dismiss the petition of the contestant and that the Court do not proceed further with the cause. Upon this motion the Court, as then constituted, divided in opinion, my brother LUDLOW being in favor of the motion, and my brother THOMPSON against it; the former holding that the jurisdiction of the Court over the case was at an end, expressing his willingness to hear the evidence in the cause, and the latter being of the opinion that it was not out of Court, but before them for decision and final determination.

Upon this state of facts the Court being unable to proceed, on the invitation of my brethren I have come into this cause upon the question as formally stated to me, "what entry should be made upon the record, where the Court is equally divided in opinion on a question of jurisdiction?" The precise point raised by this question was, however, abandoned practically by the counsel on both sides, and the question considered by them, and to which the attention of the Court was mainly directed, was, what is the true and proper construction of the fifth section of the act of July 2d, 1839, providing for the election of prothonotaries, &c., under which law the petition of William C. Stevenson was filed in this Court.

The difficulty which has arisen in the cause, is as to the true intent and meaning of the clause of the said section, which says, "and the Court shall hear and determine such contested election at the next term after the election shall have been held." This, it is contended, is imperative upon the Court, and that if the election contested shall not have been determined before the expiration of the next term, the case drops for want of further jurisdiction.

In the construction of statutes affirmative words enjoining the performance of an act by a public officer, are generally regarded as directory only; negative words will make a statute imperative, and it is apprehended affirmative may, if they are absolute, explicit, peremptory, and show that no discretion is intended to be given. Dwarris on Statutes 715. If to the clause under consideration, the words *and not after* had been added, we would have a perfect illustration of the principle stated; these words of negation would convert that which in its ordinary signification is but directory into a com-

mand; taking from the Court all discretionary power, by the use of language imperative and compulsory. It would require the clearest possible case, where the language used was affirmative only, under the well-settled rules of interpretation of statutes, to justify a Court in holding such language to be imperative; in the terms of Dwarris, just cited, it must be absolute, explicit, peremptory.

In the act now before us, the distinction is clearly taken by the Legislature; no better illustration could be cited, when it says, "and such complaint shall not be valid or regarded by the Court unless the same shall have been filed in the Prothonotary's office within ten days after the election." Here is a clear limitation upon the power of the Court; the language employed leaves no door open for question or doubt. "Shall not be valid or regarded by the Court," has but one signification; negatives the power to take action upon the complaint, by the use of language absolute, explicit, peremptory, unless the condition precedent has been complied with.

In the case of *The People* vs. *Cook*, 14 Barbour 293, the principle is stated thus: Statutes directing a mode of proceeding of public officers are regarded as directory, unless there is something in the statute which shows a different intent. So, also, in *People* vs. *Allen*, 6 Wendell 486. A statute which requires a public officer to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the language used by the Legislature, show that the designation of the time was intended as a limitation of the power of the officer.

Lord MANSFIELD, in *Rex* vs. *Loxdale*, 1 Burr. 447, says: There is a known distinction between things required to be done by act of Parliament and clauses merely directory. In *Rex* vs. *Sparrow*, 2 Strange 1123, the appointment of overseers was held to be valid, though made after the time designated in the act. The statute 54 George III. prescribed the times for holding Courts of Quarter Sessions. It was decided that Quarter Sessions held at other times were always considered good. So also the statute of 43 Elizabeth directed apprentices to be bound out till twenty-four years of age: a binding under the statute till twenty-one was held to be good.

Under our election laws the ruling has been frequent and uniform in this and other courts, that numerous requirements of the law, enjoining upon election officers the performance of specific acts, when not coupled with a question of fraud, were regarded as directory merely; and not to vitiate the election when omitted to be done; nor the act itself, when imperfectly performed, or performed out of time. The 4th section of our Habeas Corpus Act provides, that if any person committed for treason or felony, shall not be indicted and tried in the *next term* after such commitment, it shall be lawful for the Judges or Justices, and they are thereby required, to set at liberty such persons on bail. The language here used is imperative, "and they are hereby required." Yet it was held in *Commonwealth* vs. *The Jailer, &c.*, 7 Watts 366, that a person laboring under an infectious disease is not entitled of right under this section to be tried at the next term. Other exceptions are recognised in 16 Serg. & R. 305, 2 Wharton 501, and 1 Dallas 9.

The ninth section of the same act imposes upon any Judge or Justice, who, on application, shall refuse or neglect to award a writ of habeas corpus, a penalty of three hundred pounds. The Supreme Court in *Ex parte Laurence*, 5 Binney 304, and in the more recent case of *Passmore Williamson*, 2 Casey 9, construed this section to mean, that Judges were not bound on every complaint of illegal restraint of liberty to allow the writ. These last two instances of the construction which has been given to statutes, are strongly in point; for they are statutes in favor of the liberty of the citizen; in one, the language is that of command, and in the other, a penalty is imposed for a refusal to obey the requirements of the law.

Upon the argument, our own statutes relating to the writs of *quo warranto* and *certiorari* were cited in support of the view taken by the contestant: the same language in substance is used, as in the act under consideration. "Shall be heard and decided at the term to which it is returnable." "And the Court shall at the term, to which the proceedings of the justices of the peace are returnable in pursuance of writs of *certiorari*, determine and decide thereon."

The practical construction given to these acts by this and other Courts, has not limited the power of the Court to the term to which these writs were made returnable. It is, however, but due to the cause to say that no reported case was cited in which the point had been considered and decided. These authorities, to my mind, settle clearly the point that the language employed in the Act of July 2d, 1839, requiring the cause to be decided at the next term, is but directory, and ought to be so regarded, unless there be something in the statute which shows a different intent, and which would therefore require us to give to it a different construction. The first element to be extracted from this or any other statute in our search after its true signification, is to ascertain, if we can, its spirit and intent. The object to be at attained was to enable the Court of Common Pleas to inquire, determine, and judge of an undue election or return, upon the complaint of thirty or more qualified electors. The Court are enjoined in judging concerning said election to *proceed upon the merits*, and to *determine finally* concerning the same, according to the laws of this Commonwealth; then follows the clause upon which the Court differed in opinion, "and the said Court shall hear and determine such contested election at the next term after the election shall have been held."

The design of the law was to secure an investigation of a matter in which citizens generally and the candidate claiming title to the office by election, were deeply interested; questions are involved in such an issue, of the gravest importance, affecting alike the highest principles of honesty and fair dealing between man and man, and the purity of the ballot box, and the vindication of the elective right of the citizens of the Commonwealth; to guard those rights, each of them sacred, and worthy of legislative protection, the Court are enjoined to investigate the merits of the case and finally determine the same according to law; this I hold is the material intent of the Legislature; but inasmuch as they directed that a commission should not issue upon a contest being certified to the Governor, until the Court shall have determined and adjudged on the complaint filed, they directed the Court to hear and determine the same at the next term; but suppose, as in this case, the Court, for

good and sufficient reasons, do not, or cannot hear and determine the complaint within the time designated, What then? Is the law, as to the case already in progress before the proper tribunal, to be regarded as a dead letter? Are the citizens and contestant alike to be turned away, and told that the stroke of the clock has paralyzed the arm of the Court, and that they must go without remedy for an alleged violation of public and private right, because that which was not of the essence of the thing to be done, has not been complied with by the officer of the law, either with or without cause? I think not: I can gather no such meaning from the act, and can regard the command as to time, only in the light of an injunction to the Judges to speed the cause, and at the next term, if possible, fulfil the material requirements of the law, by finally determining the case upon its merits.

Any other view it seems to me reverses the natural order of things; prefers the unimportant to the material; gives to the minor consideration, namely, the time within which a decision is to be rendered, precedence of the more substantial and weighty matters of the law under consideration; for certainly it is far more essential that the Court shall decide the main question, than to allow it to fall dead before the Judges, who were enjoined to decide it finally and upon its merits, by language quite as explicit as that used to indicate the time within which it ought to be determined.

Carpenter's Case seems to have been relied on in support of a contrary view, but that case decides nothing more than that the Supreme Court had no revisatory power by *certiorari* of proceedings under the Act of July 2d, 1839, and that the decision of the Common Pleas was final—all that Judge GIBSON says in that case is by way of argument in support of this proposition, and in my opinion does not apply to the question now before this Court; nor does the point appear to have been even incidentally raised in the Court above; unless the mere citation of the words of the law by the Chief Justice in support of a totally different principle, are capable of such construction and application, which I think they are not.

I am for the reason stated of the opinion that the case of the

contestant is still in Court for determination and final judgment on the merits.

Upon the question as to the proper entry to be made on the record, where the Court is equally divided on the question of jurisdiction, I do not deem it necessary to say more than that the case of *Bingham* vs. *Cabot*, 3 Dallas 19, cited upon the argument by the counsel for the respondent, is to be regarded only as if a motion for a *venire de novo* had been made, which motion fell because the Court were equally divided upon the question as to whether the Court below had jurisdiction of the original cause of action.

LUDLOW, J., dissented.

The case was subsequently determined in favor of the contestant.

I. The foregoing case has never been reported, and as it embodies the judgment of a court having exclusive jurisdiction of the matter in controversy, it is well worthy of preservation. It is also, we believe, the only case in Pennsylvania where the clause of the Act of 2d July 1839, directing certain contested elections to be decided at the next term after they are commenced, has received a judicial construction. In Carpenter's Case, 2 Harris 486, the Supreme Court of Pennsylvania, in an opinion delivered by Chief Justice GIBSON, decided that the determination of the Common Pleas as to the election of a prothonotary or clerk, was, by virtue of the fifth section of the Act of 2d July 1839, *final*, and quashed a writ of certiorari which had issued to remove the proceedings in such a case. Carpenter's Case has never been overruled, though a minority of the judges have since contended for the power to issue a certiorari for the purpose of examining the regularity of the proceedings of the court below, but not to rejudge the merits. Scheetz's Case, cited in note to Br. Purd. 681, ed. 1853; and the still later case of the certiorari to Luzerne Co. in the matter of the contested election of E. B. Collings, determined in March, 1862.

II. The rule of interpretation enunciated by the Common Pleas in this case, is of importance, beyond the point decided in the particular cause. The opinion of the Court defines clearly the rules governing the construction of statutes, and establishes, we think, with much ability, the true distinction between those provisions in a statute, as to time, which are merely directory, and those which are prohibitory. Where acts are directed to be done by public officers, and especially where acts, regarding the rights of the public or of private suitors, are directed to be done by judicial officers, at a certain time, the acts may be done afterwards, even where a penalty is provided for their omission at the proper time. And the cases, generally, have been determined on the very proper ground that it is unjust to deprive the public or private suitors of rights which they have not forfeited by any neglect of their own. Thus in the case of Rex *vs.* Sparrow, 2 Strange 1123, the justices had been guilty of a neglect in not appointing overseers of the poor within due time,

and a mandamus was issued by the King's Bench to compel them to appoint them afterwards *for the sake of the poor*. And Lord MANSFIELD, in Rex *vs.* Loxdale, 1 Burr. 445, said: "*the poor could not have had a specific remedy* in that case, unless the justices might appoint *after* the precise time," and that the act of 43 Eliz. "did not mean that *the poor should lose the equity and benefit of the act*, if the justices did not appoint within that time." The principle of the decision in Stevenson *vs.* Lawrence is the same. The public, who are mainly interested in preventing and overturning frauds at elections, are not to lose their statutory right to a judicial investigation in cases of contested elections, where they have been guilty of no laches. The public can have no control over the time which may be necessary for a proper hearing and determination of a cause by the judiciary, which time may, and, indeed, must vary greatly, according to the circumstances of each particular case, and the pressure of business before the Court. Where, however, an act is to be done by the public, or by any number of citizens on behalf of the public, within a certain time, the same reason does not exist for holding the command of the statute to be but directory, as in the other case, because it may be entirely within the power of the parties to perform the specified act within the time designated, and consequently, if they do not, they are guilty of laches.

III. The recent case of Horton & Heil *vs.* Miller, 2 Wright 270, might seem at first glance to conflict with the foregoing decision in Stevenson *vs.* Lawrence, but an examination of the case will show that it is entirely reconcilable with it, and serves to illustrate the distinction taken between acts to be done by a *court*, and acts to be done by a *party*. The syllabus states broadly that "a court term is a definite and fixed term prescribed by law for the administration of judicial duties, within which the business of the term should be transacted. Terms may be extended to a period of time outside of their proper limits by adjournment, but the *fixed term* is not thereby enlarged." The facts of the case were these. The plaintiff declared on an insolvent bond, executed by defendants, dated June 21st 1858, in the penal sum of $360, upon condition that Horton, one of the defendants, should appear "at the next term of the Court of Common Pleas of Schuylkill county," and then and there present his petition for the benefit of the insolvent laws, &c. The next term was September Term, 1858, which commenced September 6th, and by law was to continue four weeks. The defendant, Horton, did not appear within that time, or present any petition for the benefit of the insolvent laws. The term was adjourned to December 2d, 1858. On November 25th, 1858, suit was brought on the bond, and the Court decided that nothing having been done within the time specified in the bond (which was held to be the four weeks fixed by law for the duration of the term), the condition was held to have been broken, and the plaintiffs' case was sustained. The act of omission, however, was an act to be done by a *party*, the defendant, and of course the direction as to time was held to be imperative. This case, therefore, does not in the least impeach the doctrine of Stevenson *vs.* Lawrence.

M.

United States District Court, Eastern District of Missouri.—Special Term, September, 1862.

UNITED STATES *vs.* ONE HUNDRED AND TWENTY-NINE PACKAGES, W. H. PROBASCO, CLAIMANT.

The Act of Congress of July 13th 1862, is not a *penal* but a *revenue* statute, and is to be construed liberally, so as to accomplish its proposed object.

Where a party for fraudulent purposes mixes up goods prohibited by a revenue act with those not prohibited, the whole will be forfeited.

A *citizen* may be forbidden by a *municipal* law to do what would be lawful for a neutral to do on the high seas.

A sale of contraband property to a belligerent in a neutral territory is a violation of neutrality, and, *à fortiori*, such sale in one belligerent country by a citizen or domiciled person thereof, is a breach of allegiance.

Hence the Act of July 13th 1861, prohibits every act done towards the execution of a design to carry on, without a "permit," commercial intercourse between the interdicted and other states, and it is violated not only when a vessel has actually sailed with the goods on board, but the moment the goods are started, even on land, towards the forbidden destination. The application for a "permit" is evidence of the intention to proceed, and the use of fraudulent invoices to procure the "permit," shows the intention to be fraudulent. The shipment of goods under color of that permit, is a step taken in execution of that fraudulent intent —is an overt act. Such goods are "*proceeding to*" the interdicted port within the meaning of the Act of July 13th 1861, and the shipper, under the Act of May 20th 1862, is guilty of an "*attempt*" to transport them in violation of law.

The condition of peace or war, public or civil, in a legal sense, must be determined by the political department of the Government, and the Courts are bound by that decision.

By the Act of July 13th 1861, the prohibition of commercial intercourse is to be in force "so long as such condition of hostility shall continue." The same power which determines the existence of war or insurrection, must also decide when "the condition of hostility" ceases. In a legal sense the state of war or peace is not a question *in pais* for Courts to determine. It is a legal fact ascertainable only from the decision of the political department.

Hence, when the President has proclaimed a State to be in insurrection, the Courts must hold that this condition continues until he decides to the contrary.

The same rules apply as to the exceptions from the interdict, of such parts of the insurrectionary States "as may maintain a loyal adhesion to the Union and the Constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of said insurgents." Such exceptions, and the legal status of such parts of the said States, are to be determined by the President.

Libel of information under the Act of Congress, July 13th, 1861.

W. W. Edwards and *C. S. Hayden*, for the United States.

J. K. Knight, for claimant.

The case is fully stated in the opinion by

TREAT, J.—The facts submitted in this case are substantially these:

The claimant proposing to make a shipment of merchandise to Memphis in the State of Tennessee, applied to the surveyor of the port of St. Louis for a *permit*, under the regulations of the Secretary of the Treasury pursuant to the Act of July 13th 1861.

He represented that the proposed shipment contained, among other things, 100 barrels of cement. A "permit" having been granted for the specified goods, the claimant sent on board of a steamer, bound for Memphis, said 100 barrels and the 129 packages now in litigation. The surveyor caused said shipment to be examined after it was on board of said steamer and whilst she still lay at the wharf here, and detected, that instead of 100 barrels of cement, there were 100 barrels of whiskey packed in cement for the purpose of concealing the same. Thereupon the whole shipment was seized.

The agreement of facts as filed, states that Memphis, the port of destination, is not now "in a condition of hostilities" against the United States, and that it is "occupied and controlled by forces of the United States, engaged in the dispersion of the insurgents."

The claimant does not interpose a claim for the 100 barrels of cement and the whiskey packed therein; but solely for the 129 packages which contain no prohibited goods.

The first proposition urged by his proctor, is, that the statute of July 13th 1861, is a *penal* statute in derogation of common right, and consequently it is to be strictly construed.

Common right, it must be observed, requires the bonds of society to be preserved so as to prevent anarchy, and the consequent destruction of all safeguards for persons and property. Every member of society is directly interested in its preservation. Governments are instituted for the common good; and when a blow is aimed thereat, every citizen's rights are assailed. Measures adopted

for the common safety are therefore, generally construed liberally, or so as to effect the proposed object.

The theory upon which that rule depends was fully considered in this Court in the cases of *The United States* vs. *The Steamboat Hannibal, Same* vs. *Champion*, &c., decided at the November term, 1861.

The statute of July 13th 1861, being a *revenue* statute, is to be construed according to the rules governing such Acts, and not as a mere penal enactment. In the case of *Taylor* vs. *The United States*, 3 How. 210, the Supreme Court of the United States held: "In one sense every law imposing a penalty or forfeiture may be deemed a penal law; in another sense such laws are often deemed, and truly deserve to be called, remedial. The Judge was, therefore, strictly accurate when he stated (in the Court below) that 'it must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law—that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not in the strict sense penal acts, although they may inflict a penalty for violating them.' And he added, 'it is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the Legislature in passing them.' The same distinction will be found recognised in the elementary writers: as, for example, in Blackstone's Commentaries (1 Bl. Com. 88), and Bacon's Abridgment, *Statutes* 1, 7, 8, and Comyn's Digest, *Parliament* R. 13, 19, 20, and it is also abundantly supported by authorities."

Similar decisions may be found in 1 Gall. 124; 2 Peters 358, 627; 16 Peters 342. The justice of that rule was, in the cases referred to as decided November term 1861, fully discussed by this Court in the light of right reason, of the nature, objects, and necessity of social and governmental organization, and also of the essential elements of individual safety and happiness.

Surely such statutes, adopted for the existence of government against armed efforts for its overthrow, upon the faithful observance of which the peace of society depends, should receive such a con-

struction as will according to their scope and object effect the public end designed.

Hence, in the interpretation of the Act of July 13th 1861, Courts are bound to give to it no such narrow and technical construction as may defeat its salutary purposes.

Allegiance is a primary tie, and treason the greatest of crimes; for inasmuch as allegiance is the bond by which society exists, so the breach of that allegiance by direct overt acts, is an attempt to dissolve social and governmental organization, reducing society to chaos—a condition in which moral, as well as political, obligations give way to physical force and blind passion.

The right of each and all, or "common right," is not assailed when constitutional and remedial measures are adopted for the common good.

The history of the existing rebellion fully illustrates the doctrine. The untold calamities it has devolved upon all citizens of the Republic, are too keenly felt to need exposition.

But whatever rule of interpretation is adopted in this case, the same result will follow. The claimant admits that he undertook a fraud upon the law. If the Act of July 13th 1861, was either an ordinary revenue act, or a simple penal act, he would still fall within its provisions. He chose for fraudulent purposes to mix up with unprohibited goods, those directly prohibited. He knew that the vast interests at stake, civil and military, would admit of no relaxation of the interdict against intercourse under the Act of Congress and the President's proclamation, so far at least as the shipping of whiskey to the insurrectionary States, and to our camps there, was concerned; yet for his individual gain he was willing, not only to jeopard those public interests, but to do so by a resort to falsehood and fraud. There can be no pretence that he was actuated by any higher motive than a sordid lust of gain; which ignored all considerations of law or justice. He knew that he was violating the law; and he attempted to defraud the Government, not in the matter of dollars and cents alone. Still he appears before the Court with the strange request, to have it unravel for him the tangled skein of fraud which he has deliberately woven, and then

restore to his possession such parts as would have been untainted if he had not wound them into one promiscuous mass. No principle known to law or equity tolerates such a procedure. He has mixed up the good with the bad, and the mass must be treated as he has voluntarily made it. Neither at common law, nor in equity, would a Court aid in such unclean work. In international law, as illustrated in prize cases, the owner of a contraband cargo never receives restitution of any portion of it, when thus tainted with fraud against the belligerent. It is a universal maxim, in every department of jurisprudence, "ex turpi causa, aut ex dolo malo, aut ex maleficio, non oritur actio;" and in admiralty every claimant is an *actor*. If he cannot establish his claim, except through fraud, he is left in the position he assumed. 8 Wh. 147; 8 Cranch 276, 382, 398; 6 Wh. 169; 1 Pet. 547; 12 Wh. 1, 486; 2 Cranch 72; 3 Phil. § 276; 1 Duer 625, 594; 6 Rob. 125; 1 Rob. 238, 329; 16 East 13; 3 Rob. 178, 221, 295; 2 Rob. 6; 4 Rob. 68. The intermixture of fraudulent goods with those not prohibited may, or may not, in some cases be designed to conceal the fraudulent from detection; but the law pronounces the whole mass tainted. The purpose, however, in this case, is transparent. The design was fraudulent, and the act fraudulent. The whole shipment was one transaction. If the goods had not been included in one "permit," yet, if they were shipped by the same owner, on the same voyage, and in the same vessel, they would have shared the same fate.

By the law of prize the concealment or spoliation of papers, or defective papers, call for explanation from the claimant. An assertion of a false claim, in whole or part, is a substantive cause of condemnation. A vehement presumption of bad faith, or gross prevarication or fraud, or gross misconduct, or illegality, will cause forfeiture. A party must act in entire good faith, or restitution is not awarded. The rule extends so far, that if a shipowner lends his name to cover a fraud with respect to cargo, that circumstance alone will subject the vessel to condemnation. The fraud taints all it touches. *The Pizarro*, 2 Wheaton 241; *The Fortuna*, 3 Wh. 236; *The Venus*, 5 Wh. 127; *The London Packet*, 5 Wh. 132; *The Amiable Isabella*, 6 Wh. 1; *The Pizarro*, 2 Wh. 241; *The Dos Hermanos*, 2 Wh. 76.

But as the vessel had not left port, or started on the voyage, it is contended that there has been no violation of the statute; the language of which is "all goods and chattels, wares and merchandise, &c., *proceeding to* such state or section, by land or water * * * shall be forfeited." Were the goods in question "proceeding to" the interdicted section, within the meaning of the act? It is a well-established rule, that *sailing* with an intention to evade a blockade is a beginning to execute that intention, and an overt act constituting the offence. From that moment the blockade is fraudulently invaded. *The Columbia*, 1 Rob. 156; *The Frederick Molke*, 1 Rob. 86; *The Hoffnung*, 6 Rob. 112, 117; *The Vrow Johanna*, 2 Rob. 109; *The Abby*, 5 Rob. 256; *Fitzsimmons* vs. *Newport Insurance Company*, 4 Cranch 199; *Yeaton* vs. *Fry*, 5 Cranch 343; *The Nereide*, 9 Cranch 440, 446; *The Rugen*, 1 Wh. 62.

A concealed illegal destination is proof of a real intention to break a blockade: *The James Cooke*, 1 Edw. 261. So a sale in a neutral country of contraband articles to a belligerent, is a violation of neutrality: 3 Phillimore 321. These rules spring from the inflexible duty of neutrals to observe strict impartiality. There must be no fraudulent act against belligerent rights—no attempt to depart from rigid neutrality. An intermixture or combination of neutral and hostile operations by the same person, taints the whole transaction: 3 Wh. 236, 2 Wh. 241. The loading of a contraband cargo in a neutral port, or the preparation of a vessel to run a blockade, though violative of international law, will not enable a belligerent to enter, lawfully, into such a port and capture the contraband cargo or vessel; for such an act would be a violation of neutral territory: 7 Wh. 283. Besides, a breach of blockade requires some movement towards the blockaded port. It may be far away from the neutral country; yet the sailing of the vessel with intent to enter that far-off port, is always considered an overt act. The belligerent cannot trespass upon neutral sovereignty, by entering the neutral port itself, or making a capture within the marine league; for belligerent *jurisdiction* does not attach until the vessel is on the high seas, or within the municipal control of the belligerent captor. When, however, a government

in the exercise of its *municipal* sovereignty passes a law of non-intercourse, there can be no question of neutral rights raised within its territorial jurisdiction; that is, its municipal laws are supreme within its own territory. Congress has passed penal laws against fitting out vessels in American ports for the slave trade, and it has, also, for the preservation of peace, and as an act of good faith towards other nations, forbidden the fitting out of hostile expeditions, and the enlistment of soldiers, to act against other powers with which the United States are in amity. Any act done within this country in violation of those statutes, by foreign subjects or our own citizens, is a direct breach of our municipal laws, subjecting the offender to the prescribed penalties. The Act of July 13th 1861, is a municipal and revenue statute.

Waiving all discussion of the constitutional question (which is purely municipal or intra-territorial), and looking only to the international laws of blockade, neutrals cannot sail on a voyage, with the intent to enter a blockaded port, without becoming lawful prize under the law of nations. A citizen of the United States, subject to the *municipal* law, may be forbidden by that law to do what a neutral would have a right to do on the high seas. A neutral, for instance, may lawfully enter any unblockaded port of the adverse belligerent, with a cargo not contraband, and depart therefrom; but if an American citizen (the United States being the other belligerent), should attempt to do so, the United States might subject him to severe penalties personally and confiscate his vessel and cargo, if thus found "adherent to the enemy," as was done by the Act of July 6th 1812. He is subject both to the law of nations and to the municipal law of his own domicil. It is competent for the United States, as has been judicially determined, to adopt embargo or non-intercourse acts with reference to foreign nations, and the existence of a similar power with respect to any part of this country in rebellion, has also been judicially maintained by several United States Courts, since the present civil war commenced.

If, then, a sale of contraband property, in a neutral country, to a belligerent, is a violation of neutrality under the law of nations (which law attempts to reconcile the rights of neutrals with

the rights of belligerents), how under a municipal statute, which forbids all commercial intercourse, should a clearance of a vessel for an interdicted port, with or without contraband cargo, be considered? The allegiance of the citizen is due to his country, and he is bound by its laws. He is forbidden to trade with an insurrectionary district; "all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States, shall cease and be unlawful;" "and all goods and chattels, wares and merchandise, coming from said state or section into the other parts of the United States, and all proceeding to such state or section by land or water, shall, together with the vessel or vehicle, &c., be forfeited to the United States." The overt act is not confined to actual *entrance* into the interdicted district—the success of the fraudulent voyage. If the offence was not complete until success crowned the enterprise, the object of the law would be defeated. The design of the statute is to prevent supplies from reaching the foe. Any movement towards aiding him—any act in furtherance of such a purpose, whether on land or water, is within the spirit of the statute. "Proceeding to" is a comprehensive phrase. If the prohibited intercourse is attempted on land, and a person loads a wagon and starts in furtherance of his illegal design, is he not *proceeding* in his fraudulent scheme—"proceeding to" violate his duty to the government? At what point on the journey will the offence become complete, if not at the first start? Is the rule different if the contemplated intercourse is through the agency of a vessel—to be by transportation on water instead of land? The goods are within the territorial jurisdiction of the United States, and owned by a United States citizen, and consequently are subject to the intra-territorial law. Every act done intra-territorially is subject to that law. If a sale of contraband property to a belligerent, in a neutral territory, is a violation of neutrality, *à fortiori*, such a sale in one belligerent country by any citizen or domiciled person thereof, is a breach of allegiance. This is not left to mere deduction from general principles. The Act of August 6th 1861, provides that all property, of whatsoever kind, purchased or acquired, sold or given, with intent to use the same or suffer the same to be used, in promoting

the insurrection, shall be confiscated. The Act of May 20th 1862, supplementary to the Act of July 13th 1861, after making provision for clearances in specified cases, and directing a refusal of clearances in others, whether the transportation is to be by land or water, imposes the penalty of forfeiture for an *attempt* to transport goods, &c., in violation of that Act, or the Regulations of the Secretary of the Treasury in pursuance thereof. The alleged offence in this case was subsequent to that Act, and in violation of its provisions and of the Regulations of the Secretary of the Treasury. The claimant had so far "proceeded" in his fraudulent operations as to procure a permit and actually to ship his goods. He had entered upon the interdicted enterprise. It was an "attempt" by which the penalty was incurred under the Act of May 20th 1862, if not under the Act of July 13th 1861. But there seems to be no difference in the true meaning of the terms employed between an "attempt" to transport and "proceeding to" transport. The scope and object of the two acts are the same, viz.: to prevent the interdicted intercourse. If such, however, is not the true construction of the Act of July 13th, the goods in question would be held under the Act of May 20th, and the necessary amendment of the libel allowed. The Act of July 13th, properly construed, forbids each and every act done towards the execution of a design to carry on, without a license or permit, commercial intercourse between the interdicted and other states. It is violated not only when a vessel has actually sailed on the voyage with the goods on board, but the moment the goods are started, even on land, towards the forbidden destination. The application for the "permit" is evidence of the intention to proceed, and the exhibition of fraudulent invoices in order to procure the needed permit, shows the intention to be fraudulent. The shipment of the goods under color of that permit is a step taken in execution of that fraudulent intent—is an overt act. Such goods, within the meaning of said statute, are "proceeding to" the interdicted port; and the shipper, under the Act of May 20th, is guilty of an "attempt" to transport them in violation of the law.

The Act of July 6th 1812 (2 U. S. St. 778), was entitled "An

Act to prohibit American vessels from *proceeding to*, or trading with, the enemies of the United States, and for other purposes." It imposed forfeiture on every vessel that should *depart* from a United States port for a foreign port; and fine and imprisonment upon the master guilty of violating the act. Like penalties were provided against "an attempt to transport" by land. The decisions with reference to that and other statutes for non-intercourse and embargoes, indicate that the phrase "proceeding to" has received the construction given above. A *departure*, under one of its sections, and an *attempt to transport*, under another section, were respectively overt acts of "proceeding to" the interdicted port or district. *The William and Grace*, Marriott's Decisions 76; *The Rebecca*, Id. 197; *The Julia*, 1 Gall. 43; *The Friendship*, Id. 45, 55; 7 Cranch 356; 9 Id. 102; 7 Id. 100; 2 Wheaton 148.

The next two points as presented depend for solution upon the same principles.

By the language of said Act of July 13th, the prohibition is to be in force only "so long as such condition of hostility shall continue," and the President's Proclamation of August 16th 1861, excepts from the interdict such of the states therein named (including Tennessee), and such parts of said states "as may maintain a loyal adhesion to the Union and the Constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of said insurgents." The claimant's proctor contends that "the condition of hostility," &c., is a matter *in pais*, upon which the Court is to hear the testimony of witnesses. He offers to prove by such witnesses that no such condition existed at Memphis when his shipment was made; also, the loyalty of that city, and that it was then occupied and controlled by United States forces. Indeed, for the purposes of this trial, the District Attorney admits, as a matter *in pais*, that Memphis was so occupied and controlled at the time, and that hostilities were not *flagrante bello*, actually raging in that city at the time; submitting to the Court, however, the question as to the competency of such modes of proof.

The doctrine involved has been fully discussed in several cases

decided by this Court during the last fifteen months, and was virtually settled long ago by the United States Supreme Court. The judiciary, under the constitution, cannot declare war or make peace. It is clothed with no such power, and cannot be clothed with it. Whatever power is vested by the constitution in one department of the government cannot be usurped by another. If one should wholly refuse to act, or should undertake to divest itself of, or abdicate, its legitimate functions, it would by no means follow that another department, expressly limited to specified duties, would thereby acquire ungranted powers. The abdication of executive functions by the executive, for instance, would not constitute the judicial the executive department of the country; nor would a failure or refusal of the legislative to pass needed statutes constitute the executive the law-making power. Each department has its true boundaries prescribed by the constitution, and it cannot travel beyond them. *United States* vs. *Ferrera*, 13 How. 40; *Little* vs. *Bareme*, 2 Cranch 170.

The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made. The Act of 1795 and the Act of July 13th 1861, vest the President with the power to determine when insurrection exists, and to what extent it exists.

The United States Constitution vests Congress with the power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion;" "to declare war, * * * and make rules concerning captures on land and water." In the execution of that power, Congress passed the acts cited above.

By the Act of 1795, the Supreme Court says, "the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. * * After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the Court, while the parties were actually contending in arms for the possession of the

government, call witnesses before it and inquire which party represented a majority of the people? * * If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy and not of order. Yet if this right does not reside in the courts when the conflict is raging; if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. * * At all events it (the power to decide) is conferred upon him (the President) by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals." 7 How. 43–4; also, see *Martin* vs. *Mott*, 12 Wheat. 29–31.

The same doctrine has been uniformly maintained from the commencement of the government. The absurdity of any other rule is manifest. If during the actual clash of arms, Courts were rightfully hearing evidence as to the fact of war, and either with or without the aid of juries, determining the question, they should have power to enforce their decisions. In case of foreign conflicts neither belligerent would be likely to yield to the decision: and in case of insurrection, the insurgents already in arms against the Constitution and laws, would not cease their rebellion in obedience to a judicial decree. In short, the *status* of the country as to peace or war, is legally determined by the political and not the judicial department. When the decision is made the Courts are concluded thereby, and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insurrection, must also decide when hostilities have ceased,—that is, when peace is restored. In a legal sense, the state of war or peace is not a question *in pais* for Courts to determine. It is a legal fact ascertainable only from the decision of the political department. 3 Wh. 246, 610; 4 Wh. 52, 497; 7 Wh. 283; 12 Wh. 19; 4 Cr. 241; 2 Pet. 253; 12 Pet. 511; 13 Pet. 315; 7 How. 1; 14 How. 46, 283.

Under the Act of July 13th, the President, on the 16th of August 1861, proclaimed Tennessee in a state of insurrection. The legal status thus determined must remain so long as the condition of hostility continues. He has never made a counter proclamation,

nor has peace been officially announced. As a legal *condition* that status is independent of actual daily strife in arms. A legal condition of hostilities may exist between this and a foreign nation, long after the last battle has been fought between the opposing armies. That condition ceases when peace is concluded through competent authority: not before. The distinction is between war *flagrante*, and *nondum cessante*. So far, however, is it from being true that the condition of hostilities does not still exist, that it is evident, even as a matter *in pais*, that Tennessee is still in an insurrectionary position. The presence of the United States armies in Memphis and elsewhere within that state, for the purpose of maintaining Federal authority against armed insurgents, is a well-known necessity. There has been as yet no return of that State to a peaceful status under the Constitution and laws: enabling the civil tribunals, by ordinary process, to enforce United States authority. Within any construction which could be fairly given to the President's Proclamation, no "part of that state maintains as yet a loyal adhesion to the Union and Constitution." It is the duty of the President, however, to decide that point. Until he decides to the contrary, the Court must hold that the legal condition of hostility continues.

The exceptions in the Proclamation, so far as made by the President, Courts can and must enforce. But, if it be correct that by the terms of that proclamation the President intended to devolve on the Courts the duty of determining judicially the *status* of a state, or part of a state, by an inquiry into its loyalty, or its occupation from time to time by United States forces, irrespective of a decision thereon by the executive: still Courts could not thus acquire the power. The limits upon their constitutional and legal functions could not thus be enlarged. Political power could not be so delegated to them. They cannot be charged with any duties not judicial: "judicial power" alone is vested in them under the Constitution; and the cases to which it extends are clearly defined: *United States* vs. *Ferreira*, 13 How. 40. They cannot go beyond that well-defined limit. But the Act of July 13th gives the conditions on which the Proclamation issues, and declares its effect.

It must pronounce what states or part of a state are in insurrection; for it is the official promulgation of the fact as found by the President. The exception quoted above does not change the rule. At the date of that document (August 16th 1861), Tennessee was proclaimed to be in insurrection, except as to such parts thereof where a certain condition of affairs existed, or might from time to time exist. How can any part of that state be brought within the exception for judicial cognisance? Only by the action of competent authority. The status of the part can be determined by the President alone. Has he officially decided the status by force of which the exception would operate, or Courts can judicially ascertain Memphis to be no longer in hostile condition? Or, was not that language used solely with a view to the proviso in the 5th section of the Act? It can hardly be supposed that he contemplated opening to unrestricted intercourse every town or district of an insurrectionary state, which the United States armies might occupy from time to time, on their march, irrespective of further action; thus leaving a town open to trade to-day and closed to-morrow, according to the shifting exigencies or convenience of military operations and without any Treasury regulations therefor.

It is evident, however, that the language used in that exception was not designed to leave so important a question open to doubt, uncertainty, or the contingencies of military movements from day to day. It was employed, perhaps, out of abundant caution, so as to announce that, from time to time, exceptions would be put into practical effect by him according to the rules stated: or to bring such parts of those states within the terms of the proviso, so that the Secretary of the Treasury might make the needed regulations therefor. A practical exemplification thereof is found in the case of South Carolina and Louisiana. Those states were included in the proclamation of August 16th 1861, and also in the previous proclamation of blockade; yet by another proclamation dated May 12th 1862, the President declares, that, by virtue of the powers vested in him by said Act of July 13, the blockade of the ports of Beaufort, Port Royal, and New Orleans, should cease after the first day of June following, except as to contraband

"persons, things, and information," and commercial intercourse be thereafter restored subject to the Treasury regulations made for the purpose. Those ports had been for some time "occupied and controlled by United States forces." Again, under the Act of June 7th 1862, the President once more (July 1st 1862) proclaimed Tennessee and the other States named therein, to be "in insurrection and rebellion," and there was no such exception as that quoted from the prior proclamation of August 16th 1861 True, the proclamation of July 1st 1862 had reference to the Act of June preceding; but it serves to indicate the status of Tennessee as then officially recognised.

Under the proviso of the 5th section of the Act of July 13th 1861, and by virtue of the Act of May 20th 1862, the Secretary of the Treasury has made regulations, by compliance with which persons may trade with Memphis. The claimant sought a "permit" as required, so that he might have the benefit of the exception. He succeeded by fraud in procuring the desired paper, and then undertook, in further fraud of the law, to take contraband or prohibited articles to that port.

Tennessee is interdicted to commercial intercourse, except on the specified conditions, and by special permit. The claimant must bring himself within the exceptions. 2 Cranch 72; 1 Gall. 104. He not only has failed to do so; but on the contrary admits that he exhibited fraudulent invoices to the surveyor of the port, and violated the conditions on which alone a permit could be procured. The statute pronounces the penalty of forfeiture against his whole shipment.

The packages in question are therefore declared forfeited, and costs and expenses awarded against the claimant.

Supreme Court of Pennsylvania.

JOHN DUFFY ET AL., ADM'RS. OF JOHN F. HARRISON, DECEASED, *vs.* CHARLES DUFFY.

The rule that there is no implied contract for compensation between parent and child, on the one part for maintenance and education and on the other for services, applies also between a child and a person assuming the relation of parent to it.

Though the father is bound to maintain his child, yet if the latter is taken and maintained by a relative without the father's previous request, though with his assent, there is no implied contract by the father to reimburse the relative for his expenses on the child's account.

A., on the death of his daughter, took her children home and maintained them, though their father was living. The father married again and died, when A. brought suit against his administrators for the maintenance: *held*, that under the relations of the parties, there was no implied agreement by the father to pay, and A. was not entitled to recover.

Error to the Common Pleas of Tioga county.

March 16th, 1863.—Opinion of the Court by

READ, J.—Judge LEWIS, in *Seibert's Appeal*, 7 Harris 56, says: "It was well urged in the argument by *Mansfield* and *Fonblanque* for the plaintiff in *Perry* vs. *Whitehead*, that the ground that the grandfather is not bound to provide for his grandchildren as a father is for a child, and the former is therefore not under the same moral obligation, would sound extraordinary out of a court of judicature, and certainly affords no reason. The statute of Elizabeth imposes the same moral obligation upon a grandfather and grandmother as upon the parents, which is the sense of the legislature and of mankind." 6 Ves. Jr. 546. "In Pennsylvania the grandfather as well as the father is required by the Act of 13th June 1836, § 28, to relieve and maintain his grandchildren when their necessities require it. This statute is in accordance with the moral sense of mankind. Those who suppose that infant children do not, upon the death of their parents, take the place of the latter in the affections of their grandfather, are strangers to the most ordinary manifestations of the best feelings of the human

heart. As the mementoes of the departed they have peculiar claims to his regard, and their unprotected helplessness, produced by the common bereavement, in most cases rivets his affection to them closer than they ever clung to their parent."

No truer words were ever uttered by the learned judge, and no commentary or paraphrase can add to the strength and beauty of his language. The legal obligations are well pointed out by Judge PARSONS, in a very learned opinion, in the *Guardians of the Poor* vs. *Smith*, 6 Penna. Law Journal 433.

A class of cases has been cited by the counsel for the plaintiffs in error, in which claims for compensation for services rendered have been rejected on account of the relations which the parties bore to each other. Such was the case of *Swires* vs. *Parsons*, 5 W. & S. 357, where a woman who had lived with a man as his wife sought to recover from his estate compensation for services performed in his lifetime. There the Court held that the relation between the parties repelled the idea of a contract. So in *Candor's Appeal*, Id. 513, it was held that a child is not entitled to recover wages for services rendered from the estate of the deceased parent, unless upon clear and unequivocal proof, leaving no doubt that the relation between the parties was not the ordinary one of parent and child, but of master and servant. The same doctrine was enunciated in *Defrance* vs. *Austin*, 9 Barr 309, where the claim was by an infant nephew against his uncle, and in *Lantz* vs. *Frey and Wife*, 2 Harris 201, where a stepdaughter claimed compensation for services rendered to her stepfather whilst living with him during her minority. So in *Lynn* vs. *Lynn*, 5 Casey 369, where a son brought a charge of boarding his mother against her estate.

The converse of the proposition was ruled in *Cummings* vs. *Cummings*, 8 Watts 366, where the claim was by the mother against her daughter for maintenance while an infant, the Court said the presumption from a mother's maintenance of a child, whatever be the means of either, is that she furnished it as a gift. In *Pelly* vs. *Rawlins*, Peake's Addit. Cases 226, it was held if a husband educate a wife's child by a former husband, he cannot recover compensation from such child when it comes of age. This

case is cited in Chitty, Jr., on Contracts, by Russell, 6th ed., pp. 48, 144, and he says in such cases no recovery can be had unless there be an express promise to repay him, which is also stated as the law in 1 Story on Contracts, § 82 f.

In *Williams* vs. *Hutchinson*, 5 Barbour 122, which was affirmed by the Court of Appeals in 3 Comstock 312, it was held that a stepfather is not entitled by law to the custody or services of the children of his wife by a former husband, nor is he bound to maintain them, but if he assumes the relation of a parent to such child, receives him into his family, supports and educates him, and there is no express agreement to pay wages to the stepchild, he cannot maintain an action against the stepfather for services rendered while a minor, although the value of the services may exceed the expenses of such education and support, and a promise to pay wages will not be implied. The whole reasoning of the Court proceeds upon a principle which would likewise exclude the stepfather from claiming any compensation for his expenditures for the stepchild. And this doctrine was expressly declared in *Sharp* vs. *Crosby*, 11 Barbour 224. This assumed relation of father entitles him on the one hand to the services of his stepchildren, and entitles them on the other hand to their support and education without remuneration. In *Chilcott* vs. *Kemble et al., Ex'rs.*, 13 Barbour 502, where a parent was willing to support his infant child, and a relative, without his request but with his assent, received the child into her family and supported it as a child of her own, it was held that no agreement of the father to pay for such support could be implied, and that the moral obligation of a parent to support his child imposes on him no liability to pay for its support furnished by a relative without his request.

That case was similar in its circumstances to the case now under consideration. The mother died, when the child, who was four months old, was taken by her grandparents. The father married a second time, and the child went back to him, but returned in a short time to her grandparents, with whom she lived until their death, and continued to reside with her uncle, who had been in the same house with his parents, and he furnished her with cloth-

ing and schooling, and she performed such services as are usually performed by girls of her age, such as housework, spinning, &c. There was evidence of declarations of the father, the testator, after the marriage of the daughter, that he was going to pay the uncle for keeping his child. The court, however, ruled as we have already stated, and also that as the evidence relied upon to prove an express promise referred to a time after the service was performed, the consideration was past and executed, and not sufficient to maintain an *assumpsit* unless moved by a precedent request. There is also a very strong case of *Eilet* vs. *Waller*, 2 Bradford 287, where it was held that there was no legal obligation on the intestate to compensate the uncle for the support of the child during the period she resided with him, he having made no demand on the father to assume the care of his daughter or to pay for her support.

In the present case, Mrs. Harrison, a daughter of the plaintiff, died on the 8th of June 1851, leaving eight children. Three of them, all girls, one six weeks old, another two years old, and the other four years old, were taken from the funeral of the mother by their grandparents, the plaintiff and his wife, to their house. Mr. Harrison married again, and died in 1855. Some time after the death of the intestate, the plaintiff presented to his administrators a claim of $690, for the boarding and clothing of these children.

There was no evidence of any previous request on the part of the father, nor any contract by him with the plaintiff, nor of any express promise on his part to pay, and only some declarations which, under the decisions, were of no weight or consequence. As the relation of the plaintiff and the children precluded the idea that there could be any implied agreement on the part of the father to pay, it was clearly error on the part of the Court to charge the jury *that in the absence of an agreement with the father not to charge*, the plaintiff was entitled to recover a reasonable compensation, the amount of which will be determined by the jury.

The very reverse of this would have been sounder law.

Judgment reversed, and *venire de novo* awarded.